

REMARKS

This Amendment is submitted in reply to the non-final Office Action mailed on January 11, 2008. A Petition for a one month extension of time is submitted herewith. The Director is authorized to charge \$120 for the Petition for the one month extension of time and any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-586 on the account statement.

Claims 1-5, 7-16 and 28 are pending in this application and stand rejected. Of the rejected Claims, Claim 1 is the sole independent Claim. Claims 6 and 28 were previously canceled and Claims 17-27 were previously withdrawn. In the Office Action, Claims 1-5 and 7-16 are rejected under 35 U.S.C. §112, second paragraph. Claims 1-5 and 7-16 are rejected under 35 U.S.C. §103. In response, Claims 1 and 7 have been amended for clarity purposes. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-5 and 7-16 are rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Patent Office alleges that Claim 1 is indefinite for the recitation of "the sweetening agent mixture comprises at least 90% of its weight of a sweetening component comprising glucose polymers and glucose . . . with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture and the glucose representing from 30 to 40% of the weight of the sweetening agent mixture, wherein the sweetening component constitutes from 6 to 30% of the total weight of the frozen dessert." See, Office Action, page 2, lines 17-25. In view of the amendments to Claim 1, Applicants respectfully submit that the rejection is improper and should be withdrawn.

Currently amended independent Claim 1 recites, in part, a frozen dessert composition comprising frozen water, proteins, fat, a sweetening agent mixture and at least one stabilizing agent, wherein at least 90% by weight of the sweetening agent mixture comprises glucose polymers and glucose, the glucose polymers comprising n molecules of glucose, wherein n is an integer between 2 and 10, inclusive, with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture, wherein the sweetening agent mixture constitutes from 6 to 30% of the total weight of the frozen dessert composition. The amendment does not

add new matter. The amendment is supported in the specification at, for example, page 2, lines 9-17; page 5, lines 2-5 and 22-30; page 6, lines 8-15; page 6, line 28-page 7, line 3.

As currently amended, Claim 1 no longer includes the limitation that the glucose polymers comprise 30 to 40% by weight of glucose for reasons which will be discussed further below. Further, Applicants respectfully submit that Claim 1 makes clear that the composition comprises from 6 to 30% of a sweetening agent mixture, which comprises at least 90% by weight of glucose and glucose polymers and other components since "comprising" is open ended, as noted by the Patent Office. The specification also makes it clear that an embodiment of the present disclosure incorporates glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture. See, page 5, lines 22-30; page 7, lines 12-15. As such, Applicants respectfully submit that the scope of currently amended Claim 1 would be easily understood by the skilled artisan. Therefore, Applicants respectfully submit that those skilled in the art would understand what is claimed when the claim is read in light of the specification.

In the Office Action, Claim 1 is rejected under 35 U.S.C. §112, second paragraph, as allegedly not being clear as to what is the freezing temperature range and what standard of malleability is employed to establish if a frozen dessert product is adequately malleable according to the claim as recited. See, Office Action, page 3, lines 15-21. Applicants respectfully disagree and submit that the scope of the present claims is clear to the skilled artisan.

With respect to the freezing temperature range, the specification teaches "a frozen dessert which, independently of any incorporation of gas, is malleable and extrudable at the usual storage temperature used by a consumer of frozen products." See, specification, page 4, lines 29-31. As previously stated, Applicants respectfully submit that the skilled artisan would recognize that the "usual storage temperature used by a consumer of frozen products" would be similar to the storage temperature of a household freezer, which would have a temperature from about 0° to 8° F, or about -18° C to about -13° C. Moreover, the specification teaches storage at about -18° C and about -15° C. See, specification, Examples 1 and 2. For at least these reasons, Applicants respectfully submit that the scope of the present claims is clear to the skilled artisan.

With respect to the standard to establish sufficient malleability, the specification teaches that the frozen dessert should be "malleab[le] at a temperature of less than -15° C and [should have] perfect stability during storage." See, specification, Example 2. The specification also teaches that at the freezing temperature, the frozen dessert should have a "spoonable character"

and a “capacity to be distributed by the nozzle of a pressurized container,” such as an extruder. See, specification, page 5, lines 25-30. Moreover, the specification teaches that “sufficient malleability” of the dessert is achieved when the protein level in the composition is between 3 and 18% relative to the total weight of the composition of the dessert. See, specification, page 8, lines 19-22. As such, Applicants respectfully submit that the skilled artisan would understand what is meant by Applicants’ use of the term “malleability” and would recognize that the frozen dessert is capable of being readily deformed at usual storage temperatures for typical frozen desserts such that the frozen dessert may be readily deformed with a spoon or an extruder. For at least these reasons, Applicants respectfully submit that the rejections should be withdrawn.

Moreover, Applicants note that the Patent Office has offered no discussion as to why Applicants’ arguments regarding the freezing temperature range or the “malleable,” “extrudable” nature of the present product are not persuasive, other than to reiterate that the rejections were “stated in the previous office actions.” See, Office Action, page 3, lines 15-21. Further, the Patent Office asserts that Applicant’s statements that glucose makes the frozen dessert more malleable is of no moment because limitations from the claims cannot be read into the specification. However, although limitations in the specification cannot be incorporated into the claims, as noted by the Patent Office in the Office Action at page 15, Applicants respectfully submit that the specification must be considered when determining how Applicants intended the claims to be interpreted.

For example, the surprising sweetening and texturizing effects of the sweetening mixture and sweetening mixture’s unique compensation of reduction of fat are not recited in the rejected claims. See, Office Action, page 10, lines 18-22. However, Applicants respectfully submit that surprising results can be used to rebut a *prima facie* case of obviousness; they do not need to be recited in the claims. See, MPEP § 2144.05. Applicants respectfully submit that the recited ranges as claimed in independent Claim 1 achieve unexpected results relative to the prior art range and are not disclosed in the cited references. In this regard, Applicants respectfully submit these surprising results to rebut a *prima facie* case of obviousness for at least the reasons set forth herein.

Further, although limitations from the specification cannot be read into the claims, Applicants note that the Federal Circuit has acknowledged, time and again, that the specification is the best source for understanding claim language and must be considered when viewing the

claims. In fact, to properly interpret claim language, the Federal Circuit has held that claims must be read in view of the specification, of which they are a part. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995). Moreover, intrinsic evidence in the form of the patent specification should guide claim construction. Along these lines, the Federal Circuit recently reinforced the importance of the specification when interpreting claim language:

The claims, of course, do not stand alone. Rather, they are part of "a fully integrated written instrument," *Markman*, 52 F.3d at 978, consisting principally of a specification that concludes with the claims. For that reason, claims "must be read in view of the specification, of which they are a part." *Id.* at 979. As we stated in *Vitronics*, the specification "is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." 90 F.3d at 1582.

Phillips v. AWH Corp., 415 F.3d 1303, 1315 (Fed. Cir. 2005) (emphasis added).

Therefore, the specification remains the "single best guide" to interpreting the terms "freezing temperatures," "malleable," and "extrudable," as used by Applicants in the specification and claims. Moreover, as demonstrated above, Applicants respectfully submit that the skilled artisan would immediately appreciate the "freezing temperature" range for the products of the present disclosure, as well as the "malleable," "extrudable" nature of the products. Based on at least these noted reasons, Applicants believe that Claims 1-5 and 7-16 fully comply with 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection under 35 U.S.C. §112 second paragraph be withdrawn.

In the Office Action, Claims 1-5, 7, 9-16 and 28 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,084,295 to Whelan et al. ("*Whelan*") in view of U.S. Patent No. 3,128,193 to Hilker ("*Hilker*"). Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Whelan* in view of *Hilker* and further in view of U.S. Patent No. 4,452,824 to Cole ("*Cole*"). Claims 1-5, 9-14, 16 and 28 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,427,701 to Morley ("*Morley*") in view of *Cole*. Applicants believe these rejections are improper and respectfully traverse them for at least the reasons set forth below.

Currently amended independent Claim 1 recites, in part, a frozen dessert composition comprising frozen water, proteins, fat, a sweetening agent mixture and at least one stabilizing agent, wherein at least 90% by weight of the sweetening agent mixture comprises glucose polymers and glucose, the glucose polymers comprising n molecules of glucose, wherein n is an integer between 2 and 10, inclusive, with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture, wherein the sweetening agent mixture constitutes from 6 to 30% of the total weight of the frozen dessert composition. The amendments do not add new matter. Claim 1 was amended for clarification purposes. Applicants have observed that if the percentage of glucose increases in the composition, the frozen dessert obtained is more malleable. See, specification, page 6, lines 16-17.

Applicants have surprisingly found that it is possible to reduce the proportion of fat in a frozen dessert without limiting the malleability of the dessert at the freezing temperature, for example, by using the sweetening agent mixture of glucose polymers and glucose at the levels as claimed. See, specification, page 5, lines 19-25. Moreover, Applicants observed that the presence, in the proportions as claimed, of these glucose polymers can make it possible to avoid or reduce the greasy taste of the frozen dessert without reducing the dessert's spoonable character and its capacity to be distributed by the nozzle of a pressurized container at the freezing temperatures. See, specification, page 5, lines 25-30. Consequently, besides any sweetening effects realized by the sweetening agent mixture, numerous textural effects were surprisingly discovered that go beyond the "sweetness effects" argued to be obvious by the Patent Office.

Furthermore, because the sweetening agents mixture can comprise from 10 to 50% of glucose polymers, it is possible to not only compensate for the reduction of the quantity of fat to be used in the composition of the frozen dessert according to the present invention, but also to allow a modification of the nature of the fat. See, specification, page 5, line 31 to page 6, line 1. Indeed, it becomes possible to use, for example, as a mixture with fat having an onset of solidification temperature less than 0 °C, a certain proportion of fat having an onset of solidification temperature between 0 and 40 °C, which provides greater flexibility in the taste of the frozen dessert according to the invention. See, specification, page 7, line 26-page 8, line 3. Therefore, it becomes possible to use whole milk as a source of proteins, for example, and no longer only skimmed milk, as was the case in previously known frozen desserts. The fat in the milk can now partially replace the fat having an onset of solidification temperature of less than 0

^oC. See, specification, page 8, lines 3-9. In contrast, Applicants respectfully submit that the cited references are deficient with respect to the present claims.

Whelan in view of *Hilker* and *Morley* in view of *Cole* fail to disclose every element of independent Claim 1. For example, the cited references fail to disclose or suggest that the glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1. The Patent Office even admits that *Whelan* and *Morely* fail to disclose specific proportions of glucose and glucose polymers in the sweetener mixture. See, Office Action, page 5, lines 28-31; page 11, 12-13. Further, the Patent Office fails to even point to any place in the disclosure of *Cole* to illustrates that glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by the present claims.

Applicants also respectfully submit that because *Hilker* fails to disclose or suggest that the glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1, *Hilker* fails to remedy the deficiencies of *Whelan*. The Patent Office argues that “sucrose is a polymer of glucose, with two molecules of glucose, i.e., $n=2$, as recited by the applicant in claim 1. Corn syrup solids are dextrose, i.e., glucose. Thus *Hilker* teaches the sweetener agents that are used together (i.e., a mixture) which comprise 100% of the sweetener mixture, which is in the recited range of (at least 90%) the applicant. *Hilker* teaches the frozen confection composition where 10-12% sucrose and 7.5-8% corn syrup solids, ie., 17.5-20% sweetener . . . i.e., 50% to 60% of the sweetener composition comprising glucose comprises of glucose polymers.” See, Office Action, page 6, lines 6-13. However, Applicants respectfully disagree with the Patent Office’s statements and assert that these alleged teachings do not disclose or suggest wherein the glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1.

For example, the Patent Office alleges that “sucrose is a polymer of glucose, with two molecules of glucose, i.e., $n=2$.” However, Applicants respectfully submit that sucrose is a disaccharide having one molecule of glucose and one molecule of fructose with the molecular formula $C_{12}H_{22}O_{11}$. As such, $n=1$, not 2. In other words, sucrose does not involve n molecules of glucose where n is between 2 and 10. Further, the disclosure in *Hilker* of 10-12% sucrose is not the same thing as glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1, since sucrose comprises one molecule of glucose and one molecule of fructose. The Patent Office also alleges that *Hilker* teaches 7.5-

8% corn syrup solids. However, 7.5-8% corn syrup solids is also not the same thing as glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1. As such, Applicants respectfully submit that *Hilker* fails to remedy the deficiencies of *Whelan*.

In the Office Action, Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Whelan* and *Hilker* in view of *Cole*. However, Applicants respectfully submit that the patentability of Claim 1 as previously discussed renders moot the obviousness rejection of Claim 8 that depends therefrom. In this regard, the cited art fails to teach or suggest all of the elements of Claim 8 in combination with the novel elements of Claim 1.

Further, *Morley* and *Cole* fails to disclose or suggest that the glucose polymers represent from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by Claim 1. Instead, *Morley* and *Cole* disclose sucrose and dextrose as suitable sugars. See, *Morley*, col. 6, lines 33-47; *Cole*, col. 2, lines 51-64. As discussed above, sucrose is not a glucose polymer comprising polymers of *n* molecules of glucose, wherein *n* is an integer between 2 and 10, inclusive. Furthermore, *Morley* in view of *Cole* fails to disclose the specific proportion of glucose and glucose polymers in a sweetening mixture as claimed, and as admitted by the Patent Office with respect to *Morley*. See, Office Action, page 11, lines 12-13. For at least the reasons discussed above, even if combinable, the cited references do not teach, suggest, or even disclose all the elements of independent Claim 1 and the claims that depend therefrom and, thus, fail to render the claimed subject matter obvious.

Applicants respectfully submit that *Whelan* in view of *Hilker* and *Morley* in view of *Cole* fail to disclose or even recognize the advantages, benefits and/or properties of a frozen dessert composition comprising a sweetening agent mixture comprising glucose polymers and glucose, with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture in accordance with the present claims. Furthermore, the recited ranges requiring the glucose polymers to represent from 10 to 50% of the weight of the sweetening agent mixture as claimed in independent Claim 1 achieve unexpected results relative to the prior art range.


Accordingly, Applicants respectfully request that the obviousness rejections with respect to Claims 1-5 and 7, and 9-16 over *Whelan* in view of *Hilker*, Claim 8 over *Whelan*, *Hilker* and *Cole*, and Claims 1-5 and 8-16 over *Morley* in view of *Cole* be reconsidered and the rejections be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims which could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

BELL, BOYD & LLOYD LLP

BY



Robert M. Barrett
Reg. No. 30,142
Customer No.: 29156
Phone No. 312-807-4204

Dated: May 8, 2008